

UNITED STATES BANKRUPTCY COURT
for the
DISTRICT OF PUERTO RICO

In re:

Olympic Mills Corporation, d/b/a Olympic Group,
Debtor

Bk. No. 01-13021-GAC
Chapter 11

In re:

Coachman Incorporated,
Debtor

Bk. No. 01-13028-GAC
Chapter 11

Olympic Mills Corporation, d/b/a Olympic Group and
Coachman Incorporated,
Plaintiffs

v.

Adv. No. 03-0042-MWV

Luis A. Rivera Siaca, his wife, Enery P. Ortiz Jimenez,
a/k/a Enery P. Ortiz de Rivera, a/k/a Enery P. Ortiz Rivera,
and the Conjugal Partnership constituted by them;
Enery P. Rivera Ortiz, her husband, John Doe, and the
Conjugal Partnership constituted by them; Luis A. Rivera Ortiz,
his wife, Jane Doe, and the Conjugal Partnership constituted
by them; Dennis D. Bradford; Alejandro G. Asmar, his wife,
Nancy DeJesus, and the Conjugal Partnership constituted
by them; Wayne S. Foren; DCC Operating, Inc.;
and Development Capital Ventures, L.P.,
Defendants

MEMORANDUM OPINION

The Court has before it two motions in the above-captioned matter. The first being “Defendants DCC and DCV’s Motion to Dismiss the Amended Complaint or, Alternatively, Motion for Summary Judgment.” The second motion is “Mr. Foren’s Motion for Summary Judgment.”

The amended complaint, which is the subject of these motions, consist of ten counts. Counts I, II, III, V, VII, VIII, IX and X pertain to the Defendants, DCC Operating, Inc. (“DCC”) and Development Capital Ventures, L.P. (“DCV”). Counts IV, V and VI pertain to the Defendant, Wayne Foren (“Foren”).

Both motions are supported by affidavits, exhibits and memoranda of law. Likewise, the Plaintiffs have filed an oppositions to both motions. The oppositions to the motions are supported by declarations and exhibits, memoranda of law, counter-statements to the Defendants' statements of undisputed facts.

In connection with preparing this order, the Court has reviewed all of the pleadings, memoranda of law and the extent of exhibits in support of the various affidavits and/or declarations. In accordance with Rule 7052(a) of the Federal Rules of Bankruptcy Procedure, the Court will not make extensive findings of fact or conclusions of law, but will advise the parties of the basis for its opinion.

JURISDICTION

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Resolution for Bankruptcy Cases" dated July 19, 1994 (Torruella, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

DISCUSSION

The Court will first consider the counts against DCC and DCV.¹ Counts I, II and III are avoidance actions. Count I is a preference action under § 547(b)(1).² Count II is a fraudulent conveyance action under § 548(a)(1)(A). Count III is a fraudulent conveyance action under § 548(a)(1)(B). Count IX is a turnover action pursuant to § 542. DCC and DCV argue that these claims are barred by virtue of a settlement agreement approved by this Court. On December 20, 2001, DCV filed its proof of claim as a secured claim in the amount of \$2,742,002.49. On April 2, 2002, the Plaintiffs objected to said claim.

¹For the purpose of this decision alone, the Court will treat the claims against DCC and DCV as one, leaving for another day the issue of whether the Plaintiffs have any claims against DCC. In doing this, the Court notes that DCC is the Plaintiff in an adversary suit against Mr. Siaca Rivera, also pending in this Court.

²Unless otherwise noted, all statutory section references herein are to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. § 101, *et seq.*

On June 24, 2003, the Plaintiffs and Defendants filed a stipulation in open court, which was approved by the Court. Paragraph 5(1) of that stipulation stated that the parties agreed that the Defendants herein had a valid claim in the amount of \$2,742,002.49. The stipulation reserved for another day the issue of whether or not the claim was secured. This was the only reservation in the stipulation. No issues were raised pursuant to §§ 502(d) or 542.

The Plaintiffs argue that the stipulation did not use the term “allow” in connection with the stipulation. The Court believes that this is a distinction without a difference. The assertion of avoidance actions or turnover are part of the claims process, and since they were not preserved when the Court approved the stipulation, they are now barred. See In re MicroAge, Inc., 291 B.R. 503 (B.A.P. 9th Cir. 2002). The motion for summary judgment is granted in favor of DCC and DCV as to Counts I, II, III and IX.

Count V is a claim for rescission against the individual Defendants as well as Defendants DCC and DCV. The count is brought under 31 L.P.R.A. § 3493. A requirement under that statute is that, at the time the payment was made, the Debtor was insolvent and that the Debtor could not be compelled to fulfill the obligation for which the payment was made. The Court agrees with DCC and DCV that the complaint fails to allege sufficient facts that the Plaintiffs could not have been compelled to make the payments, which are the subject of the rescission claim and, thus, grants DCC’s and DCV’s motion on Count V.

Claim VII is a claim for equitable subordination, and Claim VIII is a claim for unjust enrichment. The Court finds that these claims are not part of the claims allowance process and that there exists material questions of fact as to each of these claims. DCC’s and DCV’s motion is denied as to Counts VII and VIII.

The last remaining claim against DCC and DCV is styled as a claim for declaratory judgment under § 105. Suffice it to say that the Court does not understand this count. To the extent the

“Wherefore” clause casts some light that it is a request for a 502(d) determination, the Court has already ruled against the Plaintiffs on that issue. DCC’s and DCV’s motion with respect to Count X is granted.

The Court now turns to the claims against Foren. These include Counts IV (improper dividends), Count V (rescission) and Count VI (breach of fiduciary duty). All of these counts revolve around Foren’s position as a director of the Plaintiffs. The Court finds that all of these counts require the determination of material facts, including the issue of the Plaintiffs’ insolvency, the issue of whether any fiduciary duties were breached, and the issue of whether certain payments were dividends, and, therefore, denies the Foren’s motion for summary judgment on these counts.

DATED this 12th day of August, 2005, at Manchester, New Hampshire.

/s/ Mark W. Vaughn
Mark W. Vaughn, Chief Judge
U.S. Bankruptcy Court, District of New Hampshire,
Sitting by designation